No. 17-1299

In the

Supreme Court of the United States

FRANCHISE TAX BOARD OF
THE STATE OF CALIFORNIA,
Petitioner,

v.

GILBERT P. HYATT,
Respondent.

On Writ of Certiorari to the
Supreme Court of Nevada

BRIEF OF *AMICI CURIAE* MULTISTATE TAX COMMISSION, NATIONAL GOVERNORS ASSOCIATION, AND NATIONAL CONFERENCE OF STATE LEGISLATURES IN SUPPORT OF PETITIONER

Scott Pattison
Executive Director
David Parkhurst
National Governors
Association
444 North Capitol St., N.W.
Suite 267
Washington, D.C 20001

William T. Pound
Executive Director
Susan Frederick
National Conference of State
Legislatures
444 North Capitol St., N.W.,
Suite 515
Washington, D.C. 20001

Gregory S. Matson
Executive Director
Helen Hecht
Counsel of Record
Multistate Tax Commission
444 North Capitol St., N.W.
Suite 425
Washington, D.C. 20001
(202) 650-0300
hhecht@mtc.gov

Counsel for *Amici Curiae*

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. In general, under *Hall*, states, as defendants, will be subject to the processes and the choice-of-law decisions of their sister-states' courts. 5

II. Under *Hall*, by haling a state's tax agency into the courts of another state, a taxpayer can disrupt tax enforcement and may, in some cases, take advantage of more favorable substantive law 8

III. *Hall* poses the greatest threat, both to state interests and to interstate cooperation, where there is natural tension between state policies which might be exploited under *Hall*. 11

IV. Recent state tax developments show that *Hall* offers the opportunity to challenge state policies through "forum-shopping," frustrating this Court's "policy of hostility" standard, and posing a threat to interstate cooperation. 16

V. Hall fails to recognize that under our Constitution, states agreed to cede certain sovereign rights while retaining others, including sovereign immunity; this failure cannot be remedied by the unilateral

exercise of comity, or by some type of "side agreement" to recognize sovereign immunity assuming one could be negotiated 20

CONCLUSION 23

TABLE OF AUTHORITIES

Cases

Allstate Insurance Co. v. Hague,
449 U.S. 302 (1981) 6

Baker v. General Motors Corp.,
522 U.S. 222 (1998) 10

C & A Carbone, Inc. v. Town of Clarkstown,
511 U.S. 383 (1994) 12

Carroll v. Lanza,
349 U.S. 408 (1955) 19

Compl., Agvise Labs., Inc. v. Gerlach,
No. 18-2018-CV-00460
(N.D. D. Ct. Mar. 26, 2018) 11

Compl., Agvise Labs., Inc. v. Gerlach,
No. 76-CV-18- 80 (Minn. D. Ct. Mar. 7, 2018) 11

Complete Auto Transit, Inc. v. Brady,
430 U.S. 274 (1977) 12

Comptroller of Treasury of Md. v. Wynne,
135 S. Ct. 1787 (2015) 13

Crutchfield Corp. v. Christopher C. Harding, in his capacity as Massachusetts Comm'r of Revenue, et al.,
Case No. CL17001145-00 (Va. Cir. Ct.) 16

Cuyler v. Adams,
449 U.S. 433 (1981) 22

Dennis v. Higgins,
498 U.S. 439 (1991) 12

Dep't of Revenue of Kentucky v. Davis,
553 U.S. 328 (2008) 12

Dep't of Revenue of Washington v. Ass'n of Washington Stevedoring Cos.,
435 U.S. 734 (1978) 12

Deutsche Bank Sec., Inc. v. Montana Bd. of Invs.,
850 N.E.2d 1140 (N.Y. 2006) 21

Durfee v. Duke,
375 U.S. 106 (1963) 6

Fair Assessment in Real Estate v. McNary,
454 U.S. 100 (1981) 9

Franchise Tax Bd. of Cal. v. Hyatt,
538 U.S. 488 (2003) ..... *passim*

Franchise Tax Bd. of California v. Dist. Ct.,
105 P.3d 772 (Nev. 2002) 9

Franchise Tax Bd. v. Hyatt,
136 S. Ct. 1277 (2016) 6, 19

Great Lakes Minerals, LLC v. Testa,
No. 17-CI-00311 (Ky. Cir. Ct., July 10, 2017) 10

Hendrick v. Conn. Dep't of Revenue Servs.,
No. DC 13- 08568 (Tex. D. Ct. Aug. 6, 2013) 11

Hyatt v. Franchise Tax Bd.,
962 N.Y.S.2d 282 (N.Y. App. Div. 2013) 10

Kraft General Foods, Inc. v. Iowa Dep't of Revenue & Finance,
505 U.S. 71 (1992) 12

Nat'l Private Truck Council, Inc. v. Oklahoma Tax Comm'n,
515 U.S. 582 (1995) 11

Nevada v. Hall,
440 U.S. 410 (1979) ..... *passim*

Northwall v. State, Dep't of Revenue,
637 N.W.2d 890 (Neb. 2002) 8

Owner-Operators Indep. Drivers Ass'n of Am. v. State,
553 A.2d 1104 (Conn. 1989) 8

Pasquantino v. United States,
544 U.S. 349 (2005) 20

Patterson v. Gladwin Corp.,
835 So.2d 137 (Ala. 2002) 8

Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co.,
243 U.S. 93 (1917) 6

Printz v. United States,
521 U.S. 898 (1997) 13

Quill Corp. v. North Dakota,
504 U.S. 298 (1992)..... 11, 17

Schoeberlein v. Purdue University,
544 N.E.2d 283 (Ill. 1989)..... 21

South Dakota v. Wayfair, Inc.,
138 S. Ct. 2080 (2018)..... 14, 17

Supreme Court of New Hampshire v. Piper,
470 U.S. 274 (1985)..... 12

Thomas v. Washington Gas Light Company,
448 U.S. 261 (1980)..... 10

Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n.,
455 U.S. 691 (1982)..... 6

U.S. Steel Corp. v. Multistate Tax Comm'n,
434 U.S. 452 (1978)..... 1, 14

U.S. Xpress, Inc. v. New Mexico Taxation & Revenue Dep't,
136 P.3d 999 (N.M. 2006) 8

Wardair Canada Inc. v. Florida Dep't of Revenue,
477 U.S. 1 (1986)..... 12

West Lynn Creamery, Inc. v. Healy,
512 U.S. 186 (1994)..... 12

Western Life Indemnity Co. v. Rupp,
235 U.S. 261 (1914) 6

Zobel v. Williams,
457 U.S. 55 (1982) 12, 14

Constitutional and Statutory Provisions

U.S. CONST. art. IV, § 1 ..... *passim*

Cal. Rev. & Tax. Cd. § 19041-47 8

Cal. Rev. & Tax. Cd. § 21011 8

Iowa Code § 602.6703 16

Tex. Civ. Prac. & Rem. Code § 37.0055 16

Regulations

830 CMR 64H.1.7 17

Other Authorities

2018 State Business Tax Climate Index, The Tax Foundation, *available at* https://taxfoundation.org/publications/state-business-tax-climate-index/ 13

AICPA Chart of States With and Without State Tax Tribunals (Current as of 2/3/2016), http://www.aicpa.org/Advocacy/Tax/StateLocal/Pages/StateTaxTribunals.aspx 10

Chris Edwards, *Tax Reform and Interstate Migration*, Cato Institute, Sept. 6, 2018, *available* at https://www.cato.org/publications/tax-budget-bulletin/tax-reform-interstate-migration#full 13

Federation of Tax Administrators Motor Fuel Uniformity Project, https://www.taxadmin.org/uniformity-project 14

Federation of Tax Administrators Tobacco Tax Uniformity Project, https://www.taxadmin.org/tobacco-tax-uniformity-project 14

Foreign-Country Money Judgments Recognition Act, *available at* http://www.uniformlaws.org/shared/docs/foreign%20country%20money%20judgments%20recognition/ufcmjra_final_05.pdf. 20

Governor Sununu Announces Executive Branch Action Regarding the Wayfair Decision, August 23, 2018, *available at* https://www.governor.nh.gov/news-media/press-2018/20180823-wayfair.htm 18

Holly Ramer, *N.H. House rejects South Dakota v. Wayfair sales tax response, heads back to drawing board*, Concord Monitor, July 26, 2018, *available at* https://www.concordmonitor.com/Back-to-drawing-board-after-House-rejects-sales-tax-bill-19061942 18

How States Can Gather Better Data for Evaluating Tax Incentives, Solutions for compiling and analyzing information on key economic development programs, Pew Charitable Trusts, June 26, 2018, *available at* https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2018/06/how-states-can-gather-better-data-for-evaluating-tax-incentives 13

Michael Mazerov, *State "Income Migration" Claims Are Deeply Flawed*, Oct. 20, 2014, Center on Budget Policy and Priorities, *available at* https://www.cbpp.org/research/state-income-migration-claims-are-deeply-flawed 13

New Hampshire to Fight Back - Governor Sununu and State Leaders Unveil Strategy To Fight Supreme Court Sales Tax Case, June 28, 2018, *available at* https://www.governor.nh.gov/news-media/press-2018/20180628-sales-tax.htm..... 18

Robert H. Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 Colum. L. Rev. 1 (1945) 5

Sales and Use Tax Collection Protection Act, https://www.alec.org/model-policy/sales-and-use-tax-collection-protection-act-2 16

The Federalist Papers No. 39 (James Madison) (C. Rossiter ed. 1961) 13

INTEREST OF THE *AMICI CURIAE*

Amici curiae, the Multistate Tax Commission, the National Governors Association, and the National Conference of State Legislatures submit this brief in support of the petitioner, California Franchise Tax Board (FTB), asking the Court to overturn *Nevada v. Hall*. [1]

Amici are organizations whose members include state governors, legislators, and tax officials from across the country. *Amici* regularly file briefs in matters like this one, which raise issues of concern to the nation's states.

The Multistate Tax Commission (MTC), created in 1967 by the Multistate Tax Compact,[2] promotes interstate cooperation by providing a forum for state tax administrators to draft uniform tax laws, conduct joint audits, facilitate the settlement of unreported business taxes, and otherwise cooperate in tax administration.[3]

---

[1] No counsel for any party authored this brief in whole or in part. Only the members of the *amici curiae*, through the payment of their membership fees, made any monetary contribution to the preparation or submission of this brief. This brief is filed by the *amici* on behalf of their organizations and not on behalf of any particular member state. Both parties have filed blanket consent to the filing of *amicus curiae* briefs, in support of either party or of neither party.

[2] *See U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452 (1978)(upholding the Compact).

[3] The Commission is made up of the tax agency heads of states that have adopted the Compact by statute. In addition to these sixteen compact members, thirty-four states are sovereignty or

The National Governors Association (NGA), founded in 1908, is the collective voice of the Nation's governors. NGA's members are the governors of the 50 states, three territories, and two commonwealths.

The National Conference of State Legislatures (NCSL) is a bipartisan organization that serves the legislators and staffs of the nation's 50 states, its commonwealths, and territories. NCSL provides research, technical assistance, and opportunities for policymakers to exchange ideas on the most pressing state issues. NCSL advocates for the interests of state governments before Congress and federal agencies.

This case is before this Court for the third time, and now the call by the states to overturn *Nevada v. Hall* is unequivocal and nearly universal. The case's holding—that a state's sovereign immunity in a sister-state's court is merely a matter of comity—was unimaginable at the time of the Constitution's ratification. Had this been the delegates' understanding, it is impossible to believe they would have consented to the other significant concessions of state sovereignty

---

associate members. Compact members are: Alabama, Alaska, Arkansas, Colorado, District of Columbia, Hawaii, Idaho, Kansas, Missouri, Montana, New Mexico, North Dakota, Oregon, Texas, Utah, and Washington. Sovereignty members are: Georgia, Kentucky, Louisiana, Michigan, Minnesota, New Jersey, Rhode Island, and West Virginia. Associate Members are: Arizona, California, Connecticut, Delaware, Florida, Illinois, Indiana, Iowa, Maine, Maryland, Massachusetts, Mississippi, Nebraska, New Hampshire, New York, NorthCarolina, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Vermont, Virginia, Wisconsin, and Wyoming. Information on the Commission and its programs is available on its website, http://www.mtc.gov/Home.aspx.

required by our Constitution. The petitioner's arguments, as well as those made by Indiana and the other 44 states, leave no doubt about this conclusion.

Your *amici* do not wish to duplicate these arguments. Instead, we write to emphasize that *Hall* poses a real, ongoing threat to the sovereign right of states to make their own tax policy choices, to enforce their taxes, and to voluntarily cooperate with other states. We also write in response to the suggestion that the solution to *Hall* is simply for states to negotiate an extra-constitutional agreement under which their sovereign immunity would be recognized.

SUMMARY OF ARGUMENT

Under the Full Faith and Credit Clause, U.S. CONST. art. IV, § 1, states agreed to give preclusive effect to the judgments of other states' courts. But the clause, as interpreted by this Court, grants significant latitude to a state court in determining whether to apply its own or another state's law. Since *Nevada v. Hall*, 440 U.S. 410 (1979), a defendant state can no longer assert its absolute sovereign immunity in another state's courts. Therefore, states may now find themselves liable to plaintiffs for claims that could not be raised by the state's own citizens, as California was here. Moreover, states may face binding adverse judgments subjecting them to the conflicting tax policy choices of the forum state.

Even if state tax policies were identical, *Hall* would threaten tax enforcement. Its holding provides a means to circumvent and disrupt the administrative processes essential for tax enforcement.

But recent events show that, where tax policies differ, *Hall* also allows a kind of forum-shopping to exploit those differences. Nor would the court's "policy of hostility" standard protect defendant state tax administrators from being subjected to the forum-state's policy choices in those cases.

States, although equal in sovereignty, otherwise differ greatly in ways that can affect their policy choices. This is particularly true in the tax area, where their interests diverge for a host of reasons including incentives to compete. But despite their differing interests or incentives to compete, states must also cooperate to ease the burdens of tax administration, and they do so, often by adopting consistent or uniform policies when they can. This Court has recently recognized the value of such cooperative efforts. *Hall* poses a serious threat to interstate cooperation.

Finally, the respondent contends that states may redress these issues by simply negotiating an agreement to recognize each other's sovereign immunity. Ironically, if such an agreement were necessary, *Hall* would likely make it harder to reach. But the states already have such an agreement, the terms of which were painstakingly negotiated 231 years ago. Under our Constitution, when the states agreed to cede a portion of their sovereign rights, they did so confident in their understanding—implicit though it was—that they retained their sovereign immunity, as of right. We ask the Court to honor that understanding.

ARGUMENT

I. In general, under *Hall*, states, as defendants, will be subject to the processes and the choice-of-law decisions of their sister-states' courts.

This case centers on *Hall's* holding that, when ratifying the Constitution, states did not retain the right to assert sovereign immunity in their sister-states' courts. This, in turn, implicates the other explicit concessions of sovereignty made by the states in forming our Constitution, including, in particular, the Full Faith and Credit Clause, and this Court's choice-of-law jurisprudence. This is unfortunate because: "it [is] difficult to point to any field in which the Court has more completely demonstrated or more candidly confessed the lack of guiding standards of a legal character than in trying to determine what choice of law is required by the Constitution." *Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488, 496 (2003)(*Hyatt I*)(citing Robert H. Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 Colum. L. Rev. 1, 16 (1945)). *Hall* subjects states to litigation where these choice of law issues are unavoidable.

The Court has long abandoned any attempt to discern a balancing-of-interests or other useful principle to limit the significant discretion that state courts have in making choice-of-law decisions. *Id.* As a result—as this case shows—a defendant state may be subjected to the forum state's substantive law, even if it conflicts with the law of the defendant state, with few apparent limits.

Whether a state court applies the forum state's or the defendant state's law, its judgment will have preclusive effect for the issues fully and fairly litigated, provided that court also determines that it has jurisdiction. *Durfee v. Duke*, 375 U.S. 106 (1963). *See also Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n.*, 455 U.S. 691 (1982) (holding that North Carolina could not deny enforcement of an Indiana court judgment even if it found the Indiana court lacked subject-matter jurisdiction). Full faith and credit applies to a judgment despite the court's mistaken application of another state's laws unless the mistake contradicts an established interpretation and is brought to the court's attention during the litigation. *See Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93, 96 (1917) and *Western Life Indemnity Co. v. Rupp*, 235 U.S. 261, 275 (1914). Naturally, the assertion of an established interpretation is likely to be a contested issue.

When the court wishes to apply its own law, instead, it need not establish that the forum state had the majority of the contacts with the particular issue. *See Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981). A constitutional issue arises only when a court adopts a "policy of hostility" to the laws of the defendant state. *Hyatt I* at 499. But the precise application of this standard is open to debate. *See Franchise Tax Bd. v. Hyatt*, 136 S. Ct. 1277, 1286 (2016)(Roberts, C.J., dissenting)(*Hyatt II*).

Still, state courts may wish to exercise comity, deferring to the law of a defendant state when there are conflicts between the forum state's and defendant

state's policies. These courts will face the daunting task of weighing competing state policy interests. As this Court observed in *Hyatt I*, "[h]aving recognized, in *Hall*, that a suit against a State in a sister State's court 'necessarily implicates the power and authority' of both sovereigns, the question of which sovereign interest should be deemed more weighty is not one that can be easily answered." *Hyatt I* at 498 (internal citations omitted).

Hall was wrong to conclude that the Constitution had not resolved the inherent conflict between state adjudicatory authority and state sovereign immunity. But this Court was right when it recognized that questions involving competing sovereign interests are difficult to answer. Nevertheless, it consigned state courts to grappling with these questions, despite the "candidly confessed" lack of guiding standards, even when the defendant is a sister state.

It is possible that some limits, previously unknown or unlooked-for, may exist, restraining the ability of taxpayers to challenge the tax policies or practices of one state in the courts of another state. But we believe, as Justice Rehnquist observed in his dissent in *Hall*, "the Court is truly adrift on uncharted waters." 440 U.S. 410 at 443. And so, then, are the states.

II. Under *Hall*, by haling a state's tax agency into the courts of another state, a taxpayer can disrupt tax enforcement and may, in some cases, take advantage of more favorable substantive law.

To be clear, our concerns have nothing to do with whether state courts and state judges may render fair verdicts with respect to their sister states. We are confident that they can. Our concerns are that such suits will disrupt tax administration and create difficult choice of law conflicts.

States, like the federal government, have developed specialized administrative processes for resolving tax matters through their explicit, conditional waiver of sovereign immunity. *See Patterson v. Gladwin Corp.*, 835 So.2d 137 (Ala. 2002); and *Northwall v. State, Dep't of Revenue*, 637 N.W.2d 890 (Neb. 2002). States bind themselves to these administrative requirements with the expectation that courts will require exhaustion of administrative remedies before allowing a suit involving tax matters to proceed. *See Owner-Operators Indep. Drivers Ass'n of Am. v. State*, 553 A.2d 1104 (Conn. 1989); and *U.S. Xpress, Inc. v. New Mexico Taxation & Revenue Dep't*, 136 P.3d 999 (N.M. 2006). States, themselves, must generally follow these processes before they can obtain a final enforceable tax liability against a taxpayer. *See* CAL. REV. & TAX. CODE §§ 19041-47 and 21011. This is why disruption of these processes is particularly problematic.

Indeed, this Court has recognized the essential role such administrative processes play in tax

enforcement, and, consequently, in funding state governments. In *Fair Assessment in Real Estate v. McNary*, the Court faced the question of whether federal courts could dismiss state tax related § 1983 claims if the plaintiff had failed to exhaust the taxing-state's administrative remedies. 454 U.S. 100 (1981). The majority in *McNary* ruled that federal courts should exercise comity to dismiss such suits, observing that the doctrine of restraint "carried particular force, in suits challenging the constitutionality of state tax laws." *Id.* at 108 (internal citations omitted). "[T]he very maintenance of the suit itself would intrude on the enforcement of the state scheme," the majority reasoned, *id.* at 114, taking up limited administrative resources, and potentially resulting in suspension of collection efforts. *Id.* at 115.

In addition to the kinds of problems recognized in *McNary*, an out-of-state suit gives the plaintiff a basis to resist informal requests for information or even subpoenas from the taxing state. The plaintiff may also petition the trial court, as Mr. Hyatt did here, to issue protective orders preventing the use of documents necessary for any administrative proceeding in the taxing state.[4] Plaintiffs may ask the sister-state's court to disregard the taxing state's regulations and rulings as well as other public acts or documents, such as tax notices, assessments, etc., that would have substantial weight in the taxing state's own forum. If the

---

[4] *Franchise Tax Bd. of California v. Dist. Ct.*, 105 P.3d 772 (Nev. 2002) (unpublished table decision), *available at* http://caseinfo.nvsupremecourt.us/document/view.do?csNameID=5165&csIID=5165&deLinkID=184207&sireDocumentNumber=02-05994 (last visited Sept. 10, 2018).

court does so, that decision will typically be subject to review only under the most lenient of standards—abuse of discretion. *See Baker v. General Motors Corp.*, 522 U.S. 222 (1998); and *Hyatt v. Franchise Tax Bd.*, 962 N.Y.S.2d 282 (N.Y. App. Div. 2013). Nor would the eventual ruling of the taxing state's administrative forum, assuming it is granted only limited jurisdiction, be entitled to preclusive effect in the sister-state's court. *See Thomas v. Washington Gas Light Company*, 448 U.S. 261 (1980). So even if the defendant state were to attempt to enforce the tax through an administrative proceeding, and even if that proceeding could be concluded despite the interference of the out-of-state suit, the ruling of the administrative tribunal might not be entitled to any effect in that out-of-state suit.[5]

In one recent case, for example, a company domiciled in Kentucky has sued Ohio and its tax commissioner under 42 U.S.C. § 1983, alleging constitutional violations related to state's assertion that it has jurisdiction to impose its Commercial Activity Tax (its gross receipts tax) on the plaintiff. *Great Lakes Minerals, LLC v. Testa*, No. 17-CI-00311 (Ky. Cir. Ct., July 10, 2017), now pending before the Kentucky Supreme Court on interlocutory appeal. (Case No. 2018-SC-000161). While this Court has directed federal courts to require plaintiffs to exhaust administrative

---

[5] At least thirty-three states have specialized tax tribunals to hear tax disputes, separate from the state's courts of general jurisdiction. *See* AICPA Chart of States With and Without State Tax Tribunals (Current as of 2/3/2016), *available at* https://www.aicpa.org/Advocacy/State/DownloadableDocuments/Chart-of-States-with-and-without-State-Tax-Tribunals.pdf.

remedies when bringing such a claim, there is no such limitation on state courts. Nor is it clear how the Court's decision in *Nat'l Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582, (1995)(holding that states that provide an adequate remedy at law are not subject to tax-related § 1983 claims) applies where the suit is brought in a sister-state's court.

Cases have also recently been brought against South Dakota and Connecticut in the courts of other states challenging tax enforcement actions. *See Compl., Agvise Labs., Inc. v. Gerlach*, No. 18-2018-CV-00460 (N.D. D. Ct. Mar. 26, 2018)(challenging a South Dakota tax audit); *Compl., Agvise Labs., Inc. v. Gerlach*, No. 76-CV-18- 80 (Minn. D. Ct. Mar. 7, 2018)(same); and Pls.' Original Pet., Req. for Declaratory J., Req. for Injunctive Relief & Req. for Disclosure, *Hendrick v. Conn. Dep't of Revenue Servs.*, No. DC 13- 08568 (Tex. D. Ct. Aug. 6, 2013)(challenging the state's efforts to enforce its tax).

III. *Hall* poses the greatest threat, both to state interests and to interstate cooperation, where there is natural tension between state policies which might be exploited under *Hall*.

This Court's dormant commerce clause decisions repeatedly stress that, before the ratification of the Constitution, the states were only too ready to compete rather than cooperate. As these decisions recognize, the states competed chiefly by erecting barriers to interstate commerce favoring local businesses. See for example: *Quill Corp. v. North Dakota*, 504 U.S. 298, 312 (1992)(the states "hindered and suppressed interstate commerce"); *Dep't of Revenue of Washington v.*

Ass'n of Washington Stevedoring Cos., 435 U.S. 734, 764 (1978)(the results were "catastrophic"); *Dennis v. Higgins*, 498 U.S. 439, 453 (1991)(there was a "prospect of a descent toward even more intense commercial animosity"); *Wardair Canada Inc. v. Florida Dep't of Revenue*, 477 U.S. 1, 7 (1986)(state "tendencies toward economic Balkanization...plagued relations"); *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 414 (1994)(state "jealousies in general" led to "retaliatory tariffs" in particular and "poisoned commercial relations"); *Dep't of Revenue of Kentucky v. Davis*, 553 U.S. 328, 338 (2008)("economic protectionism," it was feared, might cause states to retreat into "economic isolation").

The incentives for states to compete with each other to gain an economic advantage are similar to those faced by independent nations. Nor have these incentives gone away. But states are no longer independent nations. They cannot close their borders or impose greater requirements on the citizens of other states who want to take up residence, *Zobel v. Williams*, 457 U.S. 55 (1982), or who wish to practice their profession in the state. *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985). They have no ability to impose trade barriers or levy tariffs on interstate commerce. *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994). Nor can they discriminate against foreign commerce. *Kraft General Foods, Inc. v. Iowa Dep't of Revenue & Finance*, 505 U.S. 71 (1992). They cannot discriminate against out-of-state actors by imposing higher or more burdensome taxes. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). And they may not impose, even on their own residents, a tax under a system that would, if imposed by every state,

result in multiple tax burdens. *Comptroller of Treasury of Md. v. Wynne*, 135 S. Ct. 1787 (2015). The states submitted to these limits, and more, while they retained "a residuary and inviolable sovereignty," *Printz v. United States*, 521 U.S. 898, 919 (1997) (Quoting Federalist No. 39, at 245 (James Madison) (C. Rossiter ed. 1961)).

Nevertheless, states can and do compete to offer more favorable tax policies. Most states view these tax policies as central to attracting investment and creating jobs.[6] States are also routinely rated or ranked based on their tax policy choices.[7] The true competitive value of these policy choices is sometimes controversial. For example, there has been substantial debate over whether lower tax rates or more favorable tax policies drive interstate migration.[8] This type of

---

[6] *See, e.g., How States Can Gather Better Data for Evaluating Tax Incentives, Solutions for compiling and analyzing information on key economic development programs*, Pew Charitable Trusts, June 26, 2018, seeking to help states evaluate these tax incentive programs, *available at* https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2018/06/how-states-can-gather-better-data-for-evaluating-tax-incentives.

[7] *See, e.g., 2018 State Business Tax Climate Index*, The Tax Foundation, *available at* https://taxfoundation.org/publications/state-business-tax-climate-index/.

[8] See Chris Edwards, *Tax Reform and Interstate Migration*, Cato Institute, Sept. 6, 2018, *available* at https://www.cato.org/publications/tax-budget-bulletin/tax-reform-interstate-migration#full; *but see* Michael Mazerov, *State "Income Migration" Claims Are Deeply Flawed*, Oct. 20, 2014, Center on Budget Policy and Priorities, *available at* https://www.cbpp.org/research/state-income-migration-claims-are-deeply-flawed.

competition between states is not forbidden and may even be seen as a "healthy form of rivalry." *See Zobel* at 67.

Despite incentives to compete, however, states also need to collaborate for a number of reasons, including to simplify tax administration. For example, this Court recently recognized the importance of the cooperative efforts of a number of states to standardize state sales and use taxes, including their adoption of uniform definitions of products and services, simplified tax rate structures, and other uniform rules. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2100 (2018)(citing the 24 states that have adopted the Streamlined Sales and Use Tax Agreement). The states have long pursued similar cooperative efforts. For example, furthering interstate cooperation was a driving force behind the creation of the MTC. *See U.S. Steel v. Multistate Tax Comm'n*, 434 U.S. 252 (1978)(noting that the purposes of the Multistate Tax Compact include promoting uniformity and compatibility in state tax systems). The MTC's Uniformity Committee, which is open to all states, drafts model tax laws and regulations to address issues of common concern to the states and business taxpayers.[9] The Federation of Tax Administrators is another organization that promotes state tax uniformity, especially in the areas of tobacco and fuel taxes.[10] These efforts

---

[9] Information on the MTC Uniformity Committee is available on the MTC website, http://www.mtc.gov/Uniformity/About-Uniformity.

[10] See the Federation of Tax Administrators Motor Fuel Uniformity Project, https://www.taxadmin.org/uniformity-project (last visited Sept. 8, 2018); and the Tobacco Tax Uniformity Project, https://www.taxadmin.org/tobacco-tax-uniformity-project.

serve not only to simplify taxes, lowering the associated risks and compliance costs—especially for smaller, less sophisticated taxpayers—they also help lower administrative costs for states.

States also cooperate to ensure enforcement and collection of taxes. For example, the MTC offers states a multistate joint audit program, allowing them to participate in audits of large multistate businesses for state corporate income or sales and use taxes.[11] States also cooperate together and with the federal government and Canadian provinces, under the International Fuel Tax Agreement, to collect and distribute taxes on motor carriers.[12]

But interstate cooperation is voluntary. And, despite its obvious benefits, participation in cooperative efforts is often inconsistent and far from universal. As commerce becomes ever more globalized and individuals and businesses ever more mobile, striking the right balance between competition and cooperation is critical. States must, therefore, be concerned about anything that might tip that balance.

Hall raises the specter of states used as pawns in economic warfare against their fellow sovereigns. This is contrary to the spirit of the agreement made under the Constitution and the dormant commerce clause. It is also contrary to the states' clear long-term interests.

---

[11] Information on the MTC audit program is available on its website, http://www.mtc.gov/Audit-Program.

[12] Information on the International Fuel Tax Association is available on its website, https://www.iftach.org/.

IV. Recent state tax developments show that *Hall* offers the opportunity to challenge state policies through "forum-shopping," frustrating this Court's "policy of hostility" standard, and posing a threat to interstate cooperation.

Under *Hall*, taxpayers may seek and states may provide a forum to challenge the different tax policies of other states. One such case, in Virginia, is *Crutchfield Corp. v. Christopher C. Harding, in his capacity as Massachusetts Comm'r of Revenue, et al.*, Case No. CL17001145-00 (Va. Cir. Ct.). Virginia has adopted a version of a model statute drafted by the American Legislative Exchange Council (ALEC), which:

> gives an in-state business a special declaratory judgment action, which a business can seek in the courts of the state, that will determine if that business has the requisite nexus, or physical presence in another state that would justify the requirement to collect and remit sales and use taxes. And in turn, that judicial determination must be honored in other states courts under the 'full faith and credit' clause of the United States Constitution.[13]

---

[13] *See* the Sales and Use Tax Collection Protection Act on the website of the American Legislative Exchange Council, https://www.alec.org/model-policy/sales-and-use-tax-collection-protection-act-2/ (last visited Sept. 9, 2018).
Two other states, Iowa (Iowa Code § 602.6703) and Texas (Tex. Civ. Prac. & Rem. Code § 37.0055) have also adopted versions of the ALEC model.

Crutchfield has filed suit in Virginia challenging the imposition by Massachusetts of a sales tax collection obligation under that state's regulations. Those regulations assert that large Internet vendors are presumed to have specific types of physical presence in the state, and are, therefore, subject to tax collection requirements on their Massachusetts sales. *See* MDOR Regulation 830 CMR 64H.1.7: Vendors Making Internet Sales, effective Oct. 1, 2017.[14] Virginia has no similar regulation and may, presumably, apply a different interpretation of the physical presence standard as applied to these Internet vendors. If Virginia is allowed to assess the validity of the Massachusetts regulation, what is to prevent every other state from doing so, requiring Massachusetts to defend the regulation in every other state's courts?

A similar issue has arisen in New Hampshire, except that lawmakers have said they intend to assess the validity of *all* other states' remote-seller collection statutes. Shortly after this Court's *Wayfair* decision, New Hampshire's governor issued a statement saying, in part: "New Hampshire will erect every possible and constitutionally permissible legal and procedural hurdle to prevent other states from forcing our businesses to collect sales and use taxes." Specifically, the statement suggests that other states' tax agencies might be required to register with the New Hampshire Department of Justice and receive a written

---

[14] While this Court's decision in *Wayfair* removed the physical presence requirement imposed under *Quill*, Massachusetts' regulation would control the application of the physical presence test for the period after its effective date.

determination from the Department that their state laws comply with New Hampshire standards.[15] New Hampshire legislators convened in special session on July 25 and considered legislation that would have blocked the tax agencies of other states from trying to enforce sales and use tax collection obligations on sellers in the state. The legislature failed to agree on any specific legislation,[16] but New Hampshire's governor recently announced that the state would be taking other actions to protect New Hampshire businesses.[17]

Hall, no doubt, will prompt some taxpayers to engage in forum shopping, but it may be too soon to tell if states will also compete to offer favorable forums for challenging the different tax laws of other states. The seeds of such a threat have only recently been planted. But these developments should suffice to show that, where state policies differ, *Hall* likely grants certain advantages to those who can sue state tax agencies in out-of-state courts. As Justice Rehnquist observed, correctly, *Hall* provided no clear

---

[15] *See* News Release: *New Hampshire to Fight Back - Governor Sununu and State Leaders Unveil Strategy To Fight Supreme Court Sales Tax Case*, June 28, 2018, *available at* https://www.governor.nh.gov/news-media/press-2018/20180628-sales-tax.htm.

[16] Holly Ramer, *N.H. House rejects South Dakota v. Wayfair sales tax response, heads back to drawing board*, Concord Monitor, July 26, 2018, *available at* https://www.concordmonitor.com/Back-to-drawing-board-after-House-rejects-sales-tax-bill-19061942.

[17] See News Release: *Governor Sununu Announces Executive Branch Action Regarding the Wayfair Decision*, August 23, 2018, *available at* https://www.governor.nh.gov/news-media/press-2018/20180823-wayfair.htm.

limits on when one state might be made to answer claims under another state's law, in another state's court. He also warned that, "given the ingenuity of our profession, pressure for such limits will inevitably increase." *Hall* at 443 (Rehnquist, J. dissenting).

The Court has held that a state may not exhibit a policy of hostility toward a defendant state. *Hyatt I* at 489 (citing *Carroll v. Lanza*, 349 U.S. 408, 413 (1955)). In this case, for example, the Court has ruled that this policy of hostility standard requires Nevada to cap the petitioner's liability at the maximum amount that could be imposed on Nevada's own tax agency. *Hyatt II*. But this policy of hostility standard is ineffective where there are more fundamental differences in state laws. Take, for example, New Hampshire's potential efforts to limit other state's enforcement of their sales taxes by requiring those states to show that their laws comply with a standard set by New Hampshire. The Court will not be able to compare the standard New Hampshire imposes when evaluating the laws of other states to the standard it imposes on its own enforcement of sales tax, because New Hampshire has no sales tax.

Finally, the kinds of developments described above may also interfere with the ability of states to engage in cooperative efforts to simplify state tax systems by adopting uniform rules. States may, instead, face pressure to provide their businesses with a means to exploit the differences in state tax policies using *Hall*.

V. Hall fails to recognize that under our Constitution, states agreed to cede certain sovereign rights while retaining others, including sovereign immunity; this failure cannot be remedied by the unilateral exercise of comity, or by some type of "side agreement" to recognize sovereign immunity assuming one could be negotiated.

In ratifying the Constitution, the states ceded significant amounts of their sovereignty. Under the Full Faith and Credit Clause, as we have noted, they have no choice but to enforce the judgments of their sister-states' courts, including tax judgments. The significance of this concession among sovereigns should not be underestimated. For example, while countries today may enforce some types of judgments rendered by the courts of other countries, they do so only by negotiated agreement.[18] Most countries still do not recognize another country's tax judgments, a rule known as the "revenue rule." This Court acknowledged the revenue rule most recently in *Pasquantino v. United States*, 544 U.S. 349 (2005), in which it explained that the rule "at its core" prohibits "the collection of tax obligations of foreign nations." The Court described the "principal evil" against which the rule was thought to guard as "judicial evaluation of the *policy-laden enactments of other sovereigns*." *Id.* at 368 (emphasis added). Imagine how such "policy-laden enactments" might be viewed where the defendant against whom the judgment is rendered is not a private actor but a

---

[18] *See* the Foreign-Country Money Judgments Recognition Act, *available at* http://www.uniformlaws.org/shared/docs/foreign%20country%20money%20judgments%20recognition/ufcmjra_final_05.pdf.

fellow sovereign. Yet *Hall*'s ruling effectively presumes that the states intended to give these judgments full faith and credit, as well.

And even though this Court's choice-of-law jurisprudence provides no guiding standards, *see Hyatt I* at 498, *Hall's* ruling also resigns states, and their courts, to resolving difficult conflicts between the sovereign interests embodied in differing state policies. Indeed, before a court can properly exercise comity, even to dismiss a suit, it must first consider the substantive issues presented by the case. *See Schoeberlein v. Purdue University*, 544 N.E.2d 283 (Ill. 1989)(in which the Illinois supreme court considered a number of factors for and against granting dismissal under principles of comity, noting that other courts were split on the issue).

Critically, courts cannot, in their discretion, exercise comity to grant dismissal if the forum state's interests are sufficiently important. In other words, in the very cases where it may matter most, where the laws of the forum and defendant state conflict, the forum state's court may well conclude that it has no discretion. *See Deutsche Bank Sec., Inc. v. Montana Bd. of Invs.*, 850 N.E.2d 1140, 1144 (N.Y. 2006)(reasoning that it is when there is "no material conflict" between forum-state and defendant-state policies that "our courts of course remain open to reasonable deference to the law of another jurisdiction . . ..").

Nor can an agreement between the states to recognize sovereign immunity possibly substitute for the binding commitment the states believed they made in ratifying the Constitution. First, unless it is universal,

such an agreement will not have the effect of foreclosing the threats discussed above. Second, unless, once negotiated, the agreement is also approved by Congress, it will not be binding as federal law. *Cuyler v. Adams*, 449 U.S. 433, 434 (1981). Even in if Congress were to approve it, states that are willing to forego the benefit of the agreement would, presumably, be allowed to withdraw at any time. In any case, the conflicting interests and competitive pressures that naturally exist between the states make the prospect of reaching any comprehensive, binding agreement unlikely.

CONCLUSION

In the time since the Court first considered this case, the threat *Hall* poses to state sovereign interests and interstate cooperation has only grown. The concerns expressed by the dissenters in *Hall*, are now beginning to be realized. This Court should correct the mistake it made in 1979 by acknowledging the fundamental understanding that states had at the time of the ratification of the Constitution—that, while they ceded substantial sovereign rights, they retain their sovereign immunity.

Respectfully submitted,

Scott Pattison
Executive Director
David Parkhurst
National Governors Association
444 North Capitol St., N.W., Suite 267
Washington, D.C 20001

William T. Pound
Executive Director
Susan Frederick
National Conference of State Legislatures
444 North Capitol St., N.W., Suite 515
Washington, D.C. 20001

Gregory S. Matson
Executive Director
Helen Hecht
Counsel of Record
Multistate Tax Commission
444 North Capitol St., N.W., Suite 425
Washington, D.C. 20001
(202) 650-0300
hhecht@mtc.gov

September 18, 2018

Counsel for *Amici Curiae*